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Supreme Court of the United States

OCTOBER TERM 1941

No. 675

AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,

against

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

Application of City Investing Company and 165 Broadway Building, Inc. re Preferred or Trust Claims against the Defendant and/or its Receiver.

CITY INVESTING COMPANY,
Petitioner,

against

165 BROADWAY BUILDING, INC., and
THE CITY OF NEW YORK,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Facts

The petition for a writ of certiorari and the brief in support thereof are incomplete in their statements of the facts. The facts are correctly and more fully set forth in the majority opinion of the Circuit Court of Appeals reported in 120 F. (2d) 813. 165 Broadway Building, Inc., herein-

after referred to as respondent, was the owner of 165 Broadway when the adjacent railway station and connecting bridge were demolished on April 4, 1939; therefore it sustained the damage caused by such demolition. At the time it acquired title, in 1938, it received the original contract made in 1907 between the Railway Company and the then owner of said building, and it produced said original contract at the hearings before the Special Master (R. 125-126, 154-155).

Jurisdiction of This Court

It has been held by the United States Supreme Court that jurisdiction to review by certiorari will be sparingly exercised, and only in cases of peculiar gravity and general importance, or in cases affecting relations with foreign governments, or to secure uniformity of decisions. *In re Woods*, (1892) 143 U. S. 202; *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, (1893) 148 U. S. 372; *U. S.* v. *Rimer*, (1911) 220 U. S. 547.

Petitioner relies upon paragraph 5 of Rule 38 of the Rules of the United States Supreme Court, which, insofar as applicable, reads as follows:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: * * *
>
> (b) Where a circuit court of appeals * * * has decided an important question of local law in a way probably in conflict with applicable local decisions; * * *"

Summary of Argument

Respondent contends:

1. This case does not involve important questions of local law.

2. The decision of the Circuit Court of Appeals herein is not in conflict with applicable local decisions.

POINT I

This case does not involve important questions of local law.

It is undisputed that the general principles of law which determine whether a covenant runs with the land under New York law are set forth in *Neponsit Property Owners Association* v. *Emigrant Industrial Savings Bank,* 278 N. Y. 248 (1938).

Referring to this decision, the Special Master who decided in favor of the petitioner, stated (R. 45):

> "In *Neponsit Property Owners Association* v. *Emigrant Industrial Savings Bank,* 278 N. Y. 248, the Court of Appeals enumerates at page 255 the essentials necessary to constitute an ordinary covenant, one that runs with the land:
>
> '(1) It must appear that the grantor and grantee intended that the covenant should run with the land; (2) it must appear that the covenant is one "touching" or "concerning" the land with which it runs; (3) it must appear that there is "privity of estate" between the promisee or party claiming benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant'."

We quoted the above at the opening of our argument in our brief before the Circuit Court and then added:

> "We agree with the foregoing excerpt and contend that the covenants contained in the 1907 agreement fulfilled the three essential requirements enumerated therein."

Judge Lehman, who wrote the opinion in the *Neponsit* case, cited in support of his said conclusions Clark on *Covenants and Interests Running with Land,* page 74, a volume written by the learned Judge who wrote the majority opinion below.

The only question involved herein is as to the application of the general principles enunciated in the *Neponsit* case, and which are undisputed, to the specific agreement set forth at pages 176-185 of the record.

This question is of no great importance to anyone other than the parties hereto.

POINT II

The decision of the Circuit Court of Appeals is not in conflict with applicable local decisions.

The majority opinion of the Circuit Court herein refers to the three essentials of a real covenant running with the land as outlined in the above quotation from the *Neponsit* case and in Clark on *Covenants and Interests Running with Land,* page 74. Each of these three essentials is then discussed separately and the conclusion is reached: "We think this agreement is within the spirit and letter of the Neponsit rule as a running covenant." 120 F. (2d) 813, at 819 (R. 220, fol. 659).

1. The parties intended that the covenants should run with the land. This point was covered by Clark, J., in his opinion at R. 213-214. He held that the parties made their intent clearly manifest not only in paragraphs Tenth, Fif-

teenth and Sixteenth, but also in "the whole tenor of the complete document."

The 1907 agreement (R. 176) was made with Broadway-Cortlandt Company in no other capacity than as the owner of 165 Broadway. It was intended to benefit it as such owner. It paid to the Railway Company $23,557.15 because it believed that the direct connection between the railway station and 165 Broadway would enhance the value of its building. Since the contract was entered into for the purpose of benefiting the building, it necessarily follows that the parties then believed that if the connection between the building and the railway station was demolished and the contract terminated, the owner would suffer a loss to its building (1) because of its cost in repairing the physical damages to the property and (2) by reason of losing the benefits of the contract. The Railway Company apparently insisted upon inserting paragraph Ninth (R. 181) that it would be under no obligation, under any circumstances, to restore or rebuild any wall or other structure of the owner, or to pay therefor unless damaged by its negligence. The owner, therefore, insisted upon the clauses in paragraphs Tenth and Eleventh so that if the connection between the railway station and the building were demolished, the amounts paid by the owner to the Railway Company would be repaid. Paragraph Tenth provides that it would be repaid "to the Owner, its successors or assigns". Paragraph Eleventh provides for repayment "to the Owner". Wherever the word "Owner" is used throughout this contract it is clear it meant the owner at the time a right or duty accrued under a particular covenant.

Assume, for example, that the Railway Company, after having done some of the work required by the contract, called upon the owner of 165 Broadway to pay its share of the cost of construction, and suppose in the meantime the property had been transferred to a new owner? It clearly was the intention that the then owner would be obligated to pay the amount required by said contract.

In paragraph Eleventh the "Owner" agreed to pay to the Railway Company $10,000 in cash as and for the cost of providing one ticket chopper and the additional sum of $10,000 in cash if the Railway Company deemed it necessary to have two ticket choppers. Suppose after the property was transferred the Railway Company demanded an additional $10,000 for another ticket chopper. Can there be any question but that the word "Owner" as used here and throughout the agreement meant the "owner" at the time when the covenants were to be performed?

Paragraph Eleventh further provided that in case said agreement should at any time be terminated and the connection between the building and the railroad structure be discontinued, the sums so paid to the Railway Company by the "Owner" should be repaid by the Railway Company to the "Owner". This could not mean only the Broadway-Cortlandt Company since a subsequent owner might have made one of the payments provided for by the agreement. Clearly the owner at any particular date was entitled to the benefits and subject to the burdens of said agreement.

2. There was privity of estate between respondent and the Railway Company. This point is covered by the Circuit Court in its opinion at R. 214-215.

The 1907 contract immediately created a privity of estate between the owner of 165 Broadway as owner and the Railway Company. Each was granted mutual easements until such easements were destroyed in accordance with the terms of said contract. The right of the Railway Company to have access to and from the building at 165 Broadway for itself and its prospective passengers, as well as its right to have a ticket office, or its equivalent, and to have the premises maintained in a proper condition, and the right of the owner to have the bridge maintained, all constituted easements and established privity of estate between the Railway Company and the owner of 165 Broadway.

As said by Clark, J. (R. 215):

> "Whatever be the correct doctrine, we have here all the requirements which have been enforced under any version of the rule. For, as the cases uniformly hold, the creation or continuance of easements, as here for the use of the premises in question, affords all necessary privity and supports the accompanying covenants. *Nye* v. *Hoyle,* 120 N. Y. 195, 203, 24 N. E. 1, 3; *Morehouse* v. *Woodruff,* 218 N. Y. 494, 501, 113 N. E. 512; *Hazlett* v. *Sinclair,* 76 Ind. 488; *Morse* v. *Aldrich,* 19 Pick., Mass., 449; Tiffany, op. cit. §853; Clark, *Covenants,* 96 et seq., 109 et seq."

3. The covenants in question touch or concern the land. This point is covered in the opinion of Clark, J., at R. 215-220. The covenants of the Railway Company to make such payments touch and concern the land in three ways:

1. They are in effect a right given to the Railway Company to terminate the easements which touch and concern the land upon condition that the Railway Company pay a sum of money upon the exercise of such option.

2. They are in effect an agreement by the Railway Company to pay a sum of money in lieu of repairs to the building.

3. They are in effect a covenant by the Railway Company to pay a sum of money as compensation to the owner of the building for damages to his property because of the loss of the mutual easements.

The 1907 contract was intended to benefit the building and to provide some compensation to the owner of the building as a condition to terminating such benefits and as compensation therefor.

Clark, J., in his opinion pointed out (R. 219):

> "Mutuality of obligation and of right was secured by the plan (which the parties, as we have seen, conceived of as freely running); it would be destroyed

on appellee's contention when the refund goes to a stranger while the owner has to restore its building with a hole in its front and without assistance from anyone."

In *Avery* v. *New York Central & Hudson River Railroad Co.*, 106 N. Y. 142, one owning hotel property conveyed land in 1857 to a railroad company for the purpose of a railroad depot only, and the deed provided that the conveyance was made on the express condition that the grantee, its successors or assigns, should at all times maintain an opening into the premises conveyed, opposite to the hotel, for the convenient access of passengers and baggage to and from the premises conveyed, which opening should at no time be closed (p. 148). In 1881 the defendant erected a fence which prevented access between the depot and the hotel property. In 1887 a subsequent owner of the property leased the hotel to the plaintiff, who brought an action to enjoin the continuance of such fence. The court held that the provision in the 1857 deed, whereby the railroad company agreed to maintain an opening between the depot and the hotel "was for the benefit of the hotel property" (p. 154) and therefore inured to the benefit of a subsequent owner and his lessee, stating (p. 155):

"It was intended to be an agreement or covenant between the parties running with the land, providing for this access or right of way so as to continue or enhance the value of the hotel property by providing for such easy access to it from defendant's depot for passengers and baggage. (See Stanley v. Colt, 5 Wall. 119; Countryman v. Deck, 13 Abb. N. C. 110.)"

On page 155, the court stated:

"The grantors in these deeds were also the owners of the hotel property, and the easement provided for in the deeds for the transit of passengers and their baggage over this twenty feet must be construed as reserved not for the benefit of such passengers in any sense, but as an easement reserved for the benefit and in favor of the grantors being owners of the remaining

> hotel property, and as appurtenant to it, and fairly necessary for its full and proper enjoyment. It, therefore, runs with the hotel property and in favor of its owner or lessee the latter of whom has such an interest in its existence as courts will recognize and protect."

So in the case at bar the covenants provided for in the 1907 agreement for the benefit of the building at 165 Broadway were intended to and did run with the land and could be enforced by a subsequent owner.

Accord: *Post* v. *West Shore R.R. Co.*, 123 N. Y. 580; *Aikin* v. *Albany, V. & C. R.R. Co.*, 26 Barb. 289; *Countrymen* v. *Deck*, 133 Abb. N. C. 110.

A covenant to repair may run with the land. *Nye* v. *Hoyle*, 120 N. Y. 195; *Morehouse* v. *Woodruff*, 218 N. Y. 494, 501; *Levy* v. *Schnurmacher Construction Corp.*, 255 N. Y. 83, 86; *Greenfarb* v. *R. S. K. Realty Corp.*, 256 N. Y. 130; *Silberberg* v. *Trachtenberg*, 58 Misc. 536, 109 N. Y. S. 814; *Bruder* v. *Crafts & D. Co.*, 79 Misc. 88, 139 N. Y. S. 307.

Clearly, had the Railway Company covenanted that in the event of the demolition of the station it would have repaired the building at 165 Broadway, under the authorities above set forth, such a covenant would have run with the land and would have inured to the benefit of the owner at the time when the demolition occurred.

In *Greenfarb* v. *R. S. K. Realty Corp., supra*, a covenant to maintain a private road was held to run with the land. The court discussed different types of covenants running with the land, including (at p. 134) "covenants by a railroad to maintain overhead crossings over its right of way for the benefit of adjoining owners who granted the easements in part (*Aiken* v. *Albany, etc., R.R. Co.*, 26 Barb. 289; *Post* v. *West Shore R.R. Co.*, 123 N. Y. 580)." A covenant by a railroad company to maintain crossings and to issue passes to the grantor of an easement runs with the land. *Monroe* v. *Syracuse, etc.*, 220 N. Y. 224 (1910). A covenant by a railroad company to pay damages for sparks, cinders,

etc., runs with the land. *Morgan Lake Company* v. *New York, New Haven, etc.,* 230 A. D. 356, 245 N. Y. S. 146, s. c. 262 N. Y. 234.

A covenant to pay for repairs to real property may run with the land. *Lawrence Park Realty Co.* v. *Crichton,* 218 A. D. 374, 218 N. Y. S. 278; *Kennilwood Owners Assn.* v. *Jaybro R. & D. Co.,* 156 Misc. 604, 281 N. Y. S. 541; *Neponsit Property Owners Assn.* v. *Emigrant Industrial Savings Bank, supra.*

Since a covenant to repair, or pay for repairs, to real property may run with the land, it naturally follows that a covenant to pay money in lieu of such repairs is a covenant running with the land.

The covenant in the 1907 contract by the Railway Company to refund certain payments to the owner was in lieu of the agreement of the Railway Company to restore or rebuild the wall of the owner. It was the owner at the time of the demolition who sustained the damages caused by the removal of the structure, and it is such owner who in all justice and equity is entitled to the benefits of the covenant made by the Railway Company in lieu of repairing said wall.

Had the Railway Company agreed, upon the demolition of the structure, to repair the wall of 165 Broadway, there could be no doubt that under the decisions such covenant would be deemed a covenant running with the land. Suppose the Railway Company agreed that it would not only repair the wall but would also pay a sum of money to the owner of 165 Broadway to enable it to repair and repaint the corridor leading to the former entrance to the railway station? Could it be contended that the covenant to repair would run with the land while the covenant to pay a sum of money to enable the owner to repair the corridor did not run with the land?

In effect the 1907 contract contemplated that the owner would make all repairs to its building in the event of a demolition of the railway station and as compensation to it for losing the benefit of the contract and making such

repairs it would receive repayment of the amounts previously paid to the Railway Company. We submit that the Circuit Court was correct in holding that such a covenant touches and concerns the building which is part of the real estate owned by respondent.

In order to recover the amount claimed herein, it was necessary for both claimants to plead and prove performance of the covenants in the 1907 agreement to be performed on the part of the owner (fols. 212, 200). The Receiver denied performance (fols. 74, 83), claiming that the owner had failed to furnish a ticket agent for the sale of the tickets as provided for in paragraph Eleventh of the 1907 agreement (fol. 543). At the trial, the claimants showed that in lieu of supplying a ticket agent, tickets were sold by McBride in the arcade (fols. 387-388) and that this was satisfactory to the Railway Company. Naturally, it was necessary to show performance not only on the part of Broadway-Cortlandt Company and City Investing Company but also by subsequent owners (R. 122).

Nevertheless, the proof shows that after it ceased to be the owner on June 30, 1920, the City Investing Company took no steps to see that the 1907 contract was being performed, and lost all interest in the matter (R. 128-129).

The Special Master stated:

> "The record shows, however, that the Broadway-Cortlandt Company *and its successors in title right up to the time of the condemnation and demolition of the railroad* provided a substitute arrangement for the sale of said railroad tickets in the said arcade or corridor. This substitute arrangement apparently satisfied the defendant since throughout the thirty years that followed, the practice adopted by Broadway-Cortlandt Company *and its successors in title* with respect to the sale of railroad tickets was accepted by the defendant as a satisfactory compliance with the agreement" (R. 28; italics ours).

It was because the 1907 contract was performed by the Broadway-Cortlandt Company "and its successors in title right up to the time of the condemnation and demolition of the railroad" that the Special Master allowed the claims and overruled the contentions of the Railway Company as to alleged non-performance.

Meado-Lawn Homes, Inc. v. *Westchester Lighting Co.*, 171 Misc. 669, 13 N. Y. S. (2d) 709, aff'd 259 A. D. 810, 20 N. Y. S. (2d) 396, aff'd 284 N. Y. 663, was considered and cited in both the majority and minority opinions in the Circuit Court of Appeals. It quotes and follows the principles of the *Neponsit* case and merely holds that the particular agreement involved therein did not comply with any one of the three essentials for covenants running with the land enumerated in the *Neponsit* decision. The facts in the case at bar are clearly essentially different.

4. The 1907 contract could not be modified without the consent of the Railway Company. If we are correct in our contention that the 1907 agreement ran with the land, and that the burdens were binding upon and the benefits inured to the benefit of subsequent owners, it would follow that the promise of the Railway Company to make repayment was a promise to make such repayment to the person who was the owner at the time the demolition took place. Such a promise could not be modified without obtaining the express approval of the Railway Company. It is elementary that a modification of a contract cannot be made ex parte by one of the parties thereto. As pointed out by Clark, J. (R. 222):

> "Had notice been shown, there would still have remained the question whether or not a running covenant may be turned into one in gross without the consent of the servient owner. Such a serious change in the nature of the encumbrance has not been recognized with respect to easements and profits, *McKenna* v. *Brooklyn Union Elevated R. Co.*, 184 N. Y. 391, 77 N. E. 615; *McCullough* v. *Broad Exch. Co.*, 101 App. Div. 566, 92 N. Y. S. 533, affirmed 184 N. Y. 592, 77 N. E. 1191;

18 Harv. L. Rev. 608; 20 Harv. L. Rev. 136; Clark, *Covenants,* 69, 70, though the rule seems otherwise as to rents; *Demarest* v. *Willard,* 8 Cow. N. Y. 206; *Morehouse* v. *Woodruff, supra;* Clark, *Covenants,* 170. These covenants are so intimately connected with the maintenance and use of the property for the purposes contemplated by the covenanting parties that they would appear more like the easements they accompany than a simple obligation to pay rent. Compare *McCullough* v. *Broad Exch. Co., supra,* where the covenants went with the easements."

5. The attempted reservation of petitioner in an unrecorded contract of sale did not affect the rights of the respondent. When the petitioner City Investing Company acquired title in 1914, it did not at that time obtain any formal assignment by Broadway-Cortlandt Company of its rights to the 1907 contract (R. 88, 165, 158-159). Evidently, City Investing Company at that time believed that the covenants in the 1907 contract ran with the land and that, therefore, no formal assignment of the contract was necessary.

In 1920, it conveyed the premises to G. Benenson Investing Company, Inc. by a deed containing a covenant (R. 173) that it had not done or suffered anything whereby the said premises have been encumbered in any way whatsoever, except as stated, but the deed contained no reference to the 1907 contract.

It now appears that by the contract of sale which preceded said deed, the City Investing Company attempted to reserve the right to receive such payments from the Railway Company. This contract of sale was never recorded. In 1920 the possibility of a repayment from the Railway Company was exceedingly remote. By failing to incorporate said reservation in the recorded deed, the City Investing Company must have intended to abandon such reservation or to waive it with respect to subsequent grantees. It was as if the parties had stipulated that the reservation was to be binding only between the parties and not upon subsequent purchasers. Therefore, the case of

Maurer v. *Friedman,* 197 N. Y. 248, is in point. There it was held that a reservation in a recorded deed to a grantor of damages for injury to an easement with a statement that it should not become a lien upon the property was not binding on subsequent grantees. In the case at bar, the failure to include the reservation in the recorded deed, was equivalent to an agreement that such reservation should not constitute a lien on the property. Therefore, it was not intended as a reservation binding remote grantees.

Foote v. *Metropolitan Elevated Railway Co.,* 58 Hun 478, 12 N. Y. S. 516, 70 Hun 598, 24 N. Y. S. 1140, aff'd 147 N. Y. 367, was an action to restrain the elevated railway company from operating its railway until it acquired title to the street easements by condemnation and to recover damages for injury to plaintiff's abutting property. Plaintiff acquired title to the fee by a deed from Messrs. Gillie & Walker, who in turn were grantees of one Lathrop. Prior to his sale Lathrop had commenced action against the elevated railway company for damages caused to his property. In his contract of sale with Gillie & Walker, Lathrop reserved the right to such damages. This instrument was never recorded. No mention was made of this reservation in Lathrop's deed to Gillie & Walker, nor in the deed given by them to the plaintiff. The Court of Appeals affirmed a judgment on behalf of plaintiff against the elevated railway company. The defendant claimed to have purchased the easements used by them from Lathrop by reason of having settled his action against them. This claim was rejected by all the courts. Said the General Term for the First Department in 58 Hun 478, 12 N. Y. S. 516, at 518:

> "It was simply a reservation of Mr. Lathrop's rights, claims, and demands against these corporations for the damages which he had sustained by reason of their continuous trespasses while he was the owner of the property; a reservation, also, of the rights, claims and demands which might thereafter accrue to Messrs. Gillie and Walker for such damages as they should

sustain by reason of like trespasses during the ownership. And these reservations were a mere personal contract, binding only on Gillie and Walker.

The easements in question being appendant to the land and incident to its use, Mr. Lathrop could not reserve to himself the right to restrain their invasion after he had ceased to own the property. The right to enjoin the continuous deprivation of such incidents can only be possessed and enforced by the owner of the fee. He alone can be interested in maintaining free access to his premises, and in defending the incidental enjoyment of light and air.

But, even if these easements could be and were reserved, the plaintiff purchased from Gillie and Walker without notice of such reservation. The instrument under which such reservation is claimed was not recorded, and the plaintiff was certainly not put upon inquiry as to an unrecorded document limiting the estate granted in a recorded deed. The only inquiry put upon the plaintiff was as to the rights of the defendants."

6. Respondent was not chargeable with notice of the alleged reservation. No claim was made that the respondent had actual notice of the alleged reservation by City Investing Company contained in the unrecorded contract of sale made in 1919. As said by Clark, J., "indeed, the master would not stop to hear evidence of lack thereof" from the present respondent (R. 221, 150). The deed made by City Investing Company made in 1920 to G. Benenson Investing Company, Inc. (R. 173), contains no reference whatsoever to the unrecorded contract of sale. Ordinarily a contract of sale is deemed merged in the deed and the deed is presumed to contain the final agreement of the parties. *Murdock* v. *Gilchrist*, 52 N. Y. 242, at 246 (1873). Therefore, so far as subsequent purchasers were concerned, they were entitled to rely upon the assumption that any clauses contained in the contract of sale were merged in the deed, and that such deed contained the final agreement of the parties.

The recital in a deed made six years later, to which City Investing Company was not a party, to the effect that the property was being conveyed "subject to unrecorded agreements affecting said real estate" (R. 187), or references in later instruments to "agreements relating to maintenance of elevated station" (R. 193-199), did not constitute notice under the recording acts of the attempted reservation in the unrecorded contract of sale made in 1919. *Todd* v. *Eighmie,* 4 A. D. 9, 38 N. Y. S. 304; *People's Trust Co.* v. *Tonkonogy,* 144 A. D. 333, 128 N. Y. S. 1055; *Comfi Homes Corp.* v. *Goldsmith,* 257 A. D. 212, 11 N. Y. S. (2d) 568.

When City Investing Company transferred this property without incorporating in the deed any reservation of its rights it in effect represented to future owners that it had conveyed all of its interest in the premises except as otherwise specifically stated in said deed. In *Houghtaling* v. *Stoothoff,* 170 Misc. 773, 12 N. Y. S. (2d) 207, at 211 (1939), the court said:

> "And further, there is a presumption or rule in the interpretation of conveyances that a grantor is presumed to intend to convey all the interest owned by him in the premises described, unless the intent to pass a less estate is expressly manifested in the deed, or is fairly to be implied from the terms of the grant. An exception of the fee is never implied and must appear in express terms. *Blackman* v. *Striker,* 142 N. Y. 555, at page 561, 37 N. E. 484; *Myers* v. *Bell Tel. Co.,* 83 App. Div. 623, 82 N. Y. S. 83."

It would be against public policy to hold that such indefinite references in a recorded conveyance are binding upon subsequent purchasers. This would in effect render the title to this property forever unmarketable. An owner would always be faced with the possibility that someone at some time would claim an unrecorded agreement with a prior owner. The references in the deeds and mortgages were inserted, not to bind subsequent owners, but merely to avoid claims for breach of warranty as between the immediate parties. In *Sweet* v. *Henry,* 175 N. Y. 268, cited by petitioner, the reference was specific, not vague.

As said by the Circuit Court of Appeals (R. 221-222):

> "But, be that as it may, the reference is altogether too uncertain to put appellant on notice. If it pointed to anything at all, its natural referent would be the original covenant of December 3, 1907, with its sixteen paragraphs of agreement, which was unrecorded. Moreover, if meticulousness gags at the use of the plural 'agreements', it may be noted that that covenant had at least one later modification through the parties' actions, namely, substitution of McBride's ticket agency for the ticket office therein referred to. Certainly the reference is not at all apt to a contract of sale, completed by and merged in an unrestricted conveyance. And the reference is made clear by a contemporary statement in the chain of title, to wit, in the instrument for the consolidation of the mortgages, repeated in certain of the later deeds, that the property was subject to 'agreements relating to maintenance of elevated station'—apt reference to the original covenant, but not to the later sale contract. The case relied on by the master, *Ebling Brewing Co.* v. *Gennaro,* 189 App. Div. 782, 179 N. Y. S. 384, merely recognizes the general rule that an apt reference to an unrecorded instrument may place a later taker under the duty of inquiry; but then it actually holds that the taker is not responsible for the recitals within the unrecorded instrument itself and thus states a rule more strict than we need assert here. See also *Acer* v. *Westcott,* 46 N. Y. 384; *Great Southern Land Co.* v. *Valley Securities Co.,* 162 Miss. 120, 137 So. 510, 82 A. L. R. 405, with annotation at 412."

The City Investing Company should be estopped from claiming that it is entitled to receive the benefits of said contract, first, because it deliberately omitted from its deed conveying the property any reference thereto, and second, because it turned over the original contract to its grantee, thereby clothing such grantee with apparent full indicia of ownership. The following authorities hold that one who clothes another with apparent ownership of a chose in action or of goods and chattels will be precluded from asserting his title against a bona fide purchaser: *Moore* v.

Metropolitan National Bank, 55 N. Y. 41, at 47; *First National Bank* v. *Mayer,* 27 Fed. Sup. 44; *New York Life Ins. Co.* v. *Brown,* 99 Fed. (2d) 199, certiorari denied 306 U. S. 638.

POINT III

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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